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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 JAMELL WEBB,

11 Defendant.

Case No. CR12-307RSL

ORDER DENYING MOTION  
FOR JUDGMENT OF  
ACQUITTAL

12 This matter comes before the Court on Defendant's "Motion and Memorandum  
13 for Judgment of Acquittal" (Dkt. # 20). Defendant has knowingly and voluntarily  
14 waived his rights to a trial by jury and requested that the Court determine whether he  
15 committed the crime of escape, as set forth in 18 U.S.C. § 751(a) ("Section 751(a)"),  
16 based on the parties' stipulated facts. Defendant seeks judgment of acquittal because he  
17 was not in "custody" or confined in an "institution or facility" as required for a  
18 conviction of escape. Based on the Court's review of the parties' memoranda, the  
19 parties' stipulated facts and the supporting documents, the remainder of the record, and  
20 the arguments presented during the January 29, 2012 hearing, the Court DENIES  
21 Defendant's motion.

22 **I. BACKGROUND**

23 On December 3, 2010, the Court sentenced Defendant to a term of imprisonment  
24 of thirty-seven months following the Defendant's plea of guilty to a felony offense,  
25 Possession of Crack Cocaine with the Intent to Distribute, in violation 21 U.S.C. §§

1 841(a), 841(b)(1)(C) and 18 U.S.C. § 2. Stip. (Dkt. # 18-1) ¶¶ 1-2, Ex. 1. On January 9,  
2 2012, Defendant was transferred to Pioneer Fellowship House Residential Reentry  
3 Center (“RRC”) in Seattle, Washington, to serve the final portion of his thirty-seven  
4 month sentence. Id. ¶ 3. Defendant remained in the custody of the Federal Bureau of  
5 Prisons (“BOP”). At the time of his transfer, Defendant signed a form acknowledging  
6 that he may be placed on escape or abscond status and charged with escape if, among  
7 other things, he “[f]ails to return to [RRC] at the time designated by the resident’s  
8 schedule.” Id., Ex. 2.

9 A little over a month after Defendant arrived at RRC, he requested and received  
10 permission to serve the remaining part of his prison sentence on home detention at a  
11 location in Seattle, Washington. Id. ¶ 4. Even though Defendant was not required to  
12 submit to any form of electronic monitoring, he was still in BOP custody. He was  
13 required to call RRC from home each evening at 9:00 p.m. and physically report to RRC  
14 when RRC staff instructed him to appear. Id. ¶¶ 4-5. The conditions of his home  
15 detention included submission to urinalysis as requested by RRC, attendance at progress  
16 reviews at RRC twice per week, and staying at home when he was not at work. Id. ¶ 4,  
17 Ex. 5. Defendant was not employed at the time. Id. When the conditions of home  
18 detention were placed on Defendant, he acknowledged that failing to report to the RRC  
19 could constitute an escape from federal custody. Id.

20 On March 24, 2012, Defendant was directed to physically report to RRC. He did  
21 not follow that instruction or report to RRC at any time thereafter. Id. ¶ 6. He was  
22 arrested by Seattle police on September 13, 2012. Id. ¶ 7.

## 23 II. ANALYSIS

24 Under Section 751(a),

25 [w]hoever escapes or attempts to escape from the custody of the Attorney  
26 General or his authorized representative, or from any institution or facility in  
which he is confined by direction of the Attorney General, or from any

1 custody by virtue of any process issued under the laws of the United States  
2 by any court, judge, or magistrate judge...shall, if the custody or confinement  
is by virtue of an arrest on a charge of felony, or conviction of any offense,  
be fined under this title or imprisoned not more than five years, or both...

3 18 U.S.C. § 751(a).

4 Defendant contends that he has not committed the crime of escape because he  
5 was not in “custody” or confined at an “institution or facility,” as required by Section  
6 751(a). Motion at 5-6. To support this contention, Defendant relies on United States v.  
7 Baxley, 982 F.2d 1265 (9th Cir. 1992) and United States v. Burke, 694 F.3d 1062 (9th  
8 Cir. 2012). In Baxley, after being indicted for transporting a stolen vehicle across state  
9 lines, the defendant was released on a personal recognizance bond on the condition that  
10 he reside at a halfway house in Las Vegas, Nevada, while awaiting his trial. Baxley,  
11 982 F.2d at 1266. The defendant was allowed to come and go as he pleased, but he was  
12 required to log the time, duration, and purpose of his departures. Id. He was charged  
13 with escape when he failed to return from an outing and instead went to stay at his  
14 sister’s house in Las Vegas. Id. at 1267.

15 The Ninth Circuit held that there was no escape under Section 751(a) because the  
16 defendant was not in “custody.” Id. at 1269. The court emphasized that the restrictions  
17 placed on the defendant were slight, and “[i]n no way did [the defendant’s] conditions of  
18 confinement approach those of incarceration.” Id. (quotations omitted). Rather, the  
19 court found the conditions of his release to be more similar to probation because he  
20 could remain employed and come and go during the day as he chose, as long as he  
21 logged the time, purpose, and duration of his excursions. Id. The court noted that the  
22 defendant was assigned to the halfway house not as part of his sentence after trial, but  
pursuant to the conditions of a personal recognizance bond.” Id.

23 In Burke, the Ninth Circuit similarly held that a defendant who had completed his  
24 imprisonment and was residing at a halfway house as a condition of supervised release  
25

1 was not in “custody” as required by Section 751(a). Burke, 694 F.3d at 1064. Relying  
2 on Baxley, the court noted that the defendant was free to work outside of the center and  
3 come and go as long as he signed in and out. Id. Like the defendant in Baxley, the  
4 defendant “was not serving a prison sentence, nor was he confined to the [halfway  
5 house] under conditions equivalent to custodial incarceration.” Id.

6 In Burke, the court distinguished the defendant’s situation from those presented  
7 in United States v. Jones, 569 F.2d 499 (9th Cir. 1978) and United States v. Keller, 912  
8 F.2d 1058 (9th Cir. 1990), two cases cited by the government in response to Defendant’s  
9 motion. As the Ninth Circuit acknowledged in Burke, and as the government contends  
10 here, “there is a crucial distinction between Burke and the defendants in Keller and  
11 Jones: the latter were committed to BOP custody when they absconded. In contrast,  
12 Burke had completed his prison term and was no longer in BOP custody when he left  
13 the [halfway house].” Burke, 694 F.3d at 1065 (citations omitted).

14 The Court finds the circumstances surrounding Defendant Webb’s failure to  
15 report to RRC more closely analogous to those present in Keller and Jones than those in  
16 Burke and Baxley. In Keller, the defendant was serving a term of probation following  
17 his conviction of a misdemeanor tax offense. Keller, 912 F.2d at 1059. He violated the  
18 terms of his probation and the court revoked his probation and imposed a one year term  
19 of imprisonment. Id. The Court gave the defendant a little over two weeks to wind up  
20 his affairs and ordered him to report to the residential center by 4:00 p.m. on August 10,  
21 1987. Id. The defendant did not report to the center on the designated date and was  
22 later arrested and charged and convicted of escape. Id.

23 Like Webb, the defendant in Keller argued that he could not have escaped from  
24 custody because he was not in custody. Id. The Ninth Circuit disagreed, finding that  
25 there was “no doubt that he was effectively ordered into custody as of 4:00 p.m. on  
26

1 August 10. An instant later, he was an escapee.” Id. at 1060. Like Webb, the  
2 defendant’s sentence was imposed and effective at the time he failed to report. Id.  
3 (“The important point is that the sentence was imposed and was effective, without  
4 further contemplated action or order of the court, to cause Keller’s legal confinement no  
5 later than 4:00 p.m. on August 10.”). Webb was in the midst of serving his original  
6 prison sentence when he failed to report. Stip. ¶¶ 3-4. Like the defendant in Keller, he  
7 was not awaiting trial or on supervised release. Burke and Baxley are distinguishable on  
8 that ground. In those cases, the defendants were not serving post-conviction, pre-  
9 supervised release, sentences when they escaped.

10 The Court also finds that the conditions of Webb’s confinement more closely  
11 resemble incarceration than probation. Unlike the defendants in Burke and Baxley,  
12 Webb was required to remain in the home when he was not working and he was not  
13 given any freedom to come and go as he pleased. Id. ¶ 4, Ex. 5. Even though he was  
14 confined to his house, Defendant argues that the fact that he was in the home without  
15 electronic monitoring, as opposed to being in a prison, weighs in favor of finding that he  
16 was not in “custody.” Motion at 7. However, it is well settled that custody need not  
17 involve direct physical restraint. Keller, 912 F.2d at 1059; see also United States v.  
18 Rudinsky, 439 F.2d 1074, 1076 (6th Cir. 1971) (“A person may still be in custody, even  
19 though not under constant supervision of guards, so long as there is some restraint upon  
20 his complete freedom.”).

21 Similarly, there is nothing in the records transferring Webb to RRC and then to  
22 home detention that indicate that he was not intended to be in “custody” while serving  
23 home detention. See Baxley, 982 F.2d at 1270 (finding support for holding in the earlier  
24 order in which the judge declined to check the box indicating that the defendant was in  
25 the custody of a given institution). On the contrary, as part of both transfers, Webb  
26 expressly acknowledged and agreed that he was in custody and would be charged with

1 escape if he failed to abide by the conditions of the transfers. See Stip., Exs. 2, 5.

2 Based on this record, the Court finds that there was ample indication that he was  
3 intended to be in “custody.”

4 Finally, Webb contends that the Court is required to employ the rule of lenity  
5 when interpreting whether he was in “custody” because the escape statute is a criminal  
6 statute. Motion at 7. The Court disagrees. “A statute is not ambiguous for purposes of  
7 lenity merely because there is a division of judicial authority over its proper  
8 construction.” Reno v. Koray, 515 U.S. 50, 64-65 (1995) (quotation marks omitted).  
9 “The rule of lenity applies only if, after seizing everything from which aid can be  
10 derived, we can make no more than a guess as to what Congress intended.” Id.  
(quotation marks and citations omitted).

### 11 **III. CONCLUSION**

12 For all of the foregoing reasons, the Court DENIES Defendant’s motion for  
13 judgment of acquittal (Dkt. # 20). The judgment will appear as a separate order. The  
14 Court finds Defendant guilty of the crime of escape under Section 751(a).

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17 DATED this 31st day of January, 2013.

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21 Robert S. Lasnik  
22 United States District Judge  
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